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Personal Torts

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I. INTRODUCTION

PERSONAL Torts is the area of the law that addresses the crucial need for accountability in a society where government does not closely regulate human conduct. The liberties that our political and economic systems afford us also create parallel responsibilities for the effect our actions have on others. The fundamental principal behind Tort law is that when our actions adversely affect another citizen a panel of our peers should weigh the evidence surrounding those actions and determine the existence and amount of any liability.

In applying these principals, a framework has developed in our judicial system for ascribing liability. The initial point of analysis is whether the defendant owes a duty to the aggrieved party. Does the relationship between the parties dictate that the defendant should be accountable to the plaintiff? If duty is established, the next point of analysis is causation. Did the actions of the defendant result in the plaintiff's injuries? If each of these factors has been satisfied, the jury is then tasked with the responsibility of assessing the plaintiff's injuries and determining the appropriate amount of damages that should be applied.

In the past several years there has been a movement from the traditional common law approach to a more rigid set of codified standards. The result is that the legislature, rather than juries, has begun imposing guidelines for both the existence and non-existence of a duty, degrees of causation, and limitations upon damages. The landscape has changed dramatically in the past year due to two events. First, the legislature passed HB 4, Article 10, which caps non-economic damages in medical malpractice cases and was enacted in Chapter 74 of the Texas Civil Practice and Remedies Code.[1] The cap institutes a $250,000 non-economic damages limit against each health care provider defendant per case and a $250,000 cap per institution per case. There is no provision to increase these amounts in the future due to inflation. Second, Proposition 12 was

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1. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301-.303 (Vernon Supp. 2004).

passed, which resulted in the addition of Section 66 to Section 1, Article III of the Texas Constitution. Under Section 66, the legislature is specifically granted authority to limit the amount of non-economic damages that a defendant may be liable for in health care liability claims as well as other causes of action. Thus, the door is clearly being propped open to expand this movement towards a codified assessment of damages. This erosion of the right to trial by jury means that monied special interests can avoid jurors of a plaintiff's peers and concentrate their advocacy (lobbying) on the only jury that counts in Texas, the legislature.

II. DUTY

Several cases during the Survey period examined the existence, or non-existence of a legal duty.

A. THE GOOD SAMARITAN STATUTE

In *McIntyre v. Ramirez*,[2] the defendant in the case, Dr. Douglas McIntyre, moved for summary judgment based upon an affirmative defense to ordinary negligence provided by the Good Samaritan Statute.[3] Debra Ramirez was admitted to St. David's Medical Center to have labor induced. Her doctor, Dr. Patricia Gunter, visited her twice during the labor, but then left the labor and delivery area. When the baby began to crown, Dr. Gunter had not returned and the nurse sent out a page for "Doctor Stork," which indicated to whomever was on the floor that there was a delivery taking place without a physician and that one was needed immediately. Dr. McIntyre was on the floor visiting his patients and responded to the page. He was neither on-call for Dr. Gunter nor had he ever had any prior contact with Ms. Ramirez.[4]

Upon Dr. McIntyre's arrival, the nurse was supporting the head of the baby and told him that Ramirez was about to deliver. The complications of the delivery included a diagnosis of gestational diabetes, the baby was larger than normal for its gestational age, and the baby's arm was lodged against the mother's pelvic bone. After several failed attempts to deliver the baby, Dr. McIntyre reached inside and "swept the infant's posterior arm across the baby's chest and delivered the baby's arm."[5] The baby's anterior shoulder was then delivered followed by the rest of the baby. At this point Dr. Gunter arrived and assumed care for Ms. Ramirez. The baby suffered injuries that resulted in permanent neurological impairment and paralysis of his right upper extremity and shoulder girdle.[6]

The Good Samaritan Act in relevant part reads as follows:

2. McIntyre v. Ramirez, 109 S.W.3d 741 (Tex. 2003).
3. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (Vernon Supp. 2004).
4. *McIntyre*, 109 S.W.3d at 743.
5. *Id.*
6. *Id.*

(a) A person who in good faith administers emergency care . . . is not liable in civil damages for an act performed during the emergency unless the act is willfully or wantonly negligent.
(b) This section does not apply to care administered:
  (1) for or in expectation of remuneration; or
  (2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration.
c) If the scene of an emergency is in a hospital or other health care facility or means of medical transport, a person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is willfully or wantonly negligent, provided that this subsection does not apply to care administered:
  (1) by a person who regularly administers care in a hospital emergency room unless such a person is at the scene of the emergency for reasons wholly unrelated to the person's work in administering healthcare; or
  (2) by an admitting or attending physician of the patient or a treating physician associated by the admitting or attending physician of the patient in question.
(d) For purposes of Subsections (b)(1) and (c)(1), a person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering care under such circumstances to the patient in question shall be deemed to be acting for or in expectation of remuneration even if the person waives or elects not to charge or receive remuneration on the occasion in question.[7]

At the outset, the Texas Supreme Court stated that in order to enjoy the protection from liability provided by Section 74.001 the caregiver must offer evidence that he did not provide care "in expectation of remuneration"[8] to negate the subsection (b)(1) exception. At issue according to Justice Wainwright was "what must a person prove to establish that he or she did not act 'for or in expectation of remuneration'" within the meaning of that subsection.[9] In order to reach his conclusion, Justice Wainwright went through an extensive analysis of statutory construction that included an examination of the "plain and common meaning of the statute's words,"[10] tempered with the "primary objective to give effect to the legislature's intent."[11]

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7. TEX. CIV. PRAC. & REM. CODE § 74.001 (Vernon 2003). Note, the legislature amended the statute effective September 1, 2003. This change removed the language at issue in this case.

8. *McIntyre*, 109 S.W.3d at 742.

9. *Id.*

10. *Id.* at 745 (citing State ex rel. State Dep't of Highways & Pub. Transp. v. Gonzales, 82 S.W.2d 322, 327 (Tex. 2002) (quoting Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865 (Tex. 1999))).

11. *Id.* (citing Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002) (quoting Nat'l Liab. & Fire Ins. Co. v. Allen, 15 S.W.3d 525, 527 (Tex. 2000))).

The statute is a classic example of poorly crafted legislation that attempts to add protection for physicians expected to provide emergency medical care onto an immunity originally crafted for the general public. The result is confusing redundancy and awkward syntax. The statute was passed in 1985 and originally read:

(a) A person who in good faith administers emergency care at the scene of an emergency or in a hospital is not liable in civil damages for an act performed during the emergency unless the act is willfully or wantonly negligent.
(b) This section does not apply to care administered:
  (1) for or in expectation of remuneration;
  (2) by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration;
  (3) by a person who regularly administers care in a hospital emergency room; or
  (4) by an admitting physician or a treating physician associated by the admitting physician of the patient bringing a health-care liability claim.[12]

The legislature then determined in 1993 that this broad exception to liability required a provision clarifying that it would specifically apply to individuals who normally work in a hospital emergency room, but are providing care when they are under no obligation. The supreme court stated that the subsection (b)(1) exception for care administered in "expectation of remuneration" applied to both subsections (a) and (c).[13] At the same time, the legislature realized that they were creating a loophole as it would then become standard practice for individuals who would otherwise fall under the subsection to waive or not enforce a fee in order to be protected by the statute. Thus, subsection (d) was passed in order to "clarify" that an individual was "acting in expectation of remuneration" under subsections (b) and (c) if they would "ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering care under such circumstances to the patient in question."[14] The result was confusion about whether or not a defendant had to prove he was not "entitled" to remuneration in order to show that he did not fall under the subsection (b)(1) exception.[15]

The appeals court had denied Dr. McIntyre protection under the statute because it held "that the doctor failed to prove that he was not legally entitled to receive payment for the emergency services he rendered."[16] It was the supreme court's determination that the modifier "ordinary" in subsection (d) applied to both the word "receive" and the phrase "enti-

12. Act of September 1, 1985, 69th Leg., R.S., ch. 959, 1985 Tex. Gen. Laws 3242, 3299, *amended by* Act of May 22, 1993, 73d Leg., R.S., ch. 960, § 1, 1993 Tex. Gen. Laws 4193, 4194.
13. *See McIntyre*, 109 S.W.3d at 747-48.
14. *Id.* at 747.
15. *Id.* at 748.
16. *Id.* at 742.

tled to receive" thus a doctor did not have to demonstrate that he had no "legal" right to remuneration, but rather that he would not "ordinarily be entitled to receive remuneration."[17] Justice Wainright then turned to examination of the record to determine if McIntyre had established his defense conclusively.[18]

The only evidence that Dr. McIntyre presented at trial was his affidavit and his testimony at deposition, neither of which directly addressed his entitlement to remuneration. His affidavit stated the following:

> I did not charge the patient for my services nor did I render my services in expectation of compensation. This was not a situation for which I would ever charge. I do not specialize nor am I routinely assigned to an emergency room. I am not on an emergency response team and was not on call for the hospital, Dr. Gunter or her group on the date of this incident.[19]

Dr. McIntyre further testified that "he was not familiar with anyone in Travis County who would send a bill when they provided emergency care under the circumstances of this case."[20] Noticeably absent from this evidence is any mention of McIntyre's "entitlement" to compensation. Although Dr. McIntyre was clearly an interested witness, Justice Wainwright determined that the burden of proof was met because in his opinion it met the standard for proving facts through an interested witness established in the rules of civil procedure.[21]

Ramirez presented evidence that related to Dr. McIntyre's practice of receiving payment for delivering babies. The supreme court argued that this did not address the issue of whether or not he was "entitled" to compensation. The supreme court also asserted that an expert report filed by Ramirez in which a doctor expressed the opinion that Dr. McIntyre "was entitled to bill and receive a fee for the delivery of baby Colby Ramirez"[22] was a "conclusory statement of an expert witness"[23] and therefore "insufficient to create a question of fact to defeat summary judgment."[24]

While all of the evidence offered by Dr. McIntyre tended to establish that he and his colleagues were not *inclined* to accept payment for his services, especially where accepting payment would establish a legal duty, none of it directly addressed whether or not he was *entitled* to it. The only evidence offered on the issue was presented by Ramirez, but discarded by Justice Wainright. The definitions provided in subsection (d)

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17. *Id.* at 747-48.
18. *McIntyre*, 109 S.W.3d at 748.
19. *Id.* at 749.
20. *Id.*
21. TEX. R. CIV. P. 166a(c). "A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *Id.*
22. *McIntyre*, 109 S.W.3d at 749.
23. *Id.*
24. *Id.* (citing Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996)).

were added to clarify the meaning of subsection (b)(1) in the healthcare context and to close a loophole. Under the supreme court's ruling, a defendant can meet his burden of proof regarding that section without offering any evidence to meet one of its clear requirements and without allowing a jury to balance competing relevant evidence.

B. Physician's Treatment of Children Without Parental Consent: Emergent Circumstances

In *Miller v. HCA, Inc.*,[25] the Texas Supreme Court examined whether there are circumstances that dictate an exception to the general rule that physicians are liable for treating a child without consent. The Millers had been awarded a judgment against HCA for negligence and battery. The appellate court reversed the trial court as a matter of law, asserting that "parents have no right to refuse urgently-needed life-sustaining medical treatment for their child unless the child's condition is 'certifiably terminal.'"[26] The supreme court affirmed the appeals court, but took a different approach, creating an exception to the general rule that a physician is liable for treating a child without parental consent. Describing the exception, the supreme court stated that "a physician, who is confronted with emergent circumstances and provides life-sustaining treatment to a minor child, is not liable for not first obtaining consent from the parents."[27]

When Karla Miller was admitted into Woman's Hospital of Texas for premature labor it was determined that her fetus was about 629 grams and had a gestational age of approximately twenty-three weeks. To prevent the baby's birth Karla was initially treated to stop labor. After physicians determined that Karla had a life threatening infection, they decided to induce delivery. The doctors for Karla informed her husband that upon birth the baby had little chance of being alive and if it survived it would likely suffer from several impairments, including cerebral palsy, brain hemorrhaging, blindness, lung disease, pulmonary infections, and mental retardation.[28]

The Millers were asked based upon this information whether they wanted the infant treated upon birth. Their response was that "they wanted no heroic measures performed on the infant and they wanted nature to take its course."[29] That afternoon the hospital administrators met to discuss the situation and decided that a neonatologist would be present at the delivery and a decision would be made at birth whether or not to attempt resuscitation. The testimony of the attendees was that this decision was made because there was some question as to how far along the baby really was and the belief that it would be inappropriate to decide whether or not to give care until the child's condition could be observed.

25. Miller v. HCA, Inc., 118 S.W.3d 758 (Tex. 2003).
26. *Id.* at 761.
27. *Id.* at 767-68.
28. *Id.* at 762.
29. *Id.*

The hospital asked Mr. Miller to sign a consent form to allow resuscitation and he refused. The only option given to the Millers to prevent the hospital from providing resuscitation was to remove Karla from the hospital, which was not possible since it would be life threatening.[30]

When circumstances made it necessary for the hospital to augment labor to protect Karla's life, the Miller's child was born alive at a weight of 615 grams and a gestational age of twenty-three and one-seventh weeks. The neonatologist then bagged and intubated Sidney to oxygenate her blood. He then placed her on ventilation. Within a few days of her birth, Sidney suffered a brain hemorrhage. The court described Sidney's condition at the time of trial as follows:

> Sidney was seven years old and could not feed herself, or sit up on her own. The evidence demonstrated the Sidney was legally blind, suffered from sever mental retardation, cerebral palsy, seizures, and spastic quadri paresis in her limbs. She could not be toilet-trained and required a shunt in her brain to drain fluids that accumulate there and needed care twenty-four hours a day. The evidence further demonstrated that her circumstances would not change.[31]

The grounds for the Miller's claims of battery and negligence were that the hospital "not only resuscitated Sidney, but performed experimental procedures and administered experimental drugs, without which, in all reasonable medical probability, Sidney would not have survived."[32] The trial court put questions to the jury about the hospital's conduct, and the jury found that the hospital's and HCA's negligence proximately caused the Miller's damages. The jury further concluded that HCA and the hospital were grossly negligent and that the Hospital acted with malice. Their verdict for $29,400,000 in actual damages, $17,503,066 in prejudgment interest, and $13,500,000 in exemplary damages clearly demonstrated that they were appalled by HCA's conduct.

Upon appeal, the court of appeals reversed the trial court's judgment, concluding that the Natural Death Act[33] allowed parents to withhold medical treatment for a child whose condition is certifiably terminal, but not for a child whose condition was non-terminal. Based upon this conclusion the appellate court ruled that if a "child's condition has not been certified as terminal, a health care provider is under no duty to follow a parent's instruction to withhold urgently-needed life-sustaining medical treatment from their child."[34] The appellate court further ruled that, while a court order would generally be required when a parent does not consent, no such order would be required in these circumstances because a court is not equipped to make a choice between impairment and death. On this basis, the appellate court ruled that HCA had no tort duty to "(a)

30. *Miller*, 118 S.W.3d at 762-63.
31. *Id.* at 763-64.
32. *Id.* at 764.
33. TEX. HEALTH & SAFETY CODE ANN. §§ 166.001-.166 (Vernon 2001 & Supp. 2004).
34. HCA, Inc. v. Miller ex rel. Miller, 36 S.W.3d 187, 195 (Tex. App.—Houston [14th Dist.] 2000), *aff'd on other grounds*, 118 S.W.3d 758 (Tex. 2003).

refrain from resuscitating Sidney; (b) have no policy requiring resuscitating of patients like Sidney without consent; and c) have policies prohibiting resuscitation of patients like Sidney without consent."[35]

In reviewing the appeals court decision, the supreme court examined the legislative and judicial history regarding parental control of the medical treatment for their children. At issue are competing interests between the presumption that parents are the appropriate decision-makers regarding medical treatment of their children and the state's role as *parens patriae*, permitting it to intercede in parental decision-making under certain circumstances. While the supreme court recognized that the "[g]eneral rule in Texas is that a physician who provides treatment without consent commits a battery,"[36] Justice Enoch also pointed out that there were exceptions such as when the patient is unconscious. In *Moss v. Rishworth*, the court had held that it was legally wrong for a physician to treat a minor without the parent's consent even when there was "an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it."[37] Thus the supreme court found that *Moss* implied an exception to liability that "arises only in emergent circumstances when there is no time to consult the parents or seek court intervention if the parents withhold consent before death is likely to result to the child."[38]

The Millers argued that the exception defined by Justice Enoch's opinion would not apply to the facts of the case. They pointed out that the discussion as to whether or not to treat Sidney had gone on for several hours prior to her birth and that the hospital staff had time to meet and discuss the issue. Justice Enoch countered that these discussions were not pertinent since Sidney's condition could not be determined with certainty until she was born, and Dr. Otero was faced with emergent circumstances when he treated Sidney. The supreme court's logic is founded on the premise that the "circumstances" related to Sidney's treatment did not arise until she was born. The issue of whether consent for Ms. Miller's procedure was fraudulently obtained was not before the supreme court. One might presume that had she known her wishes regarding the baby were not going to be followed, she may have declined treatment and wished transfer.

C. Filial Consortium

In *Roberts v. Williamson*,[39] the Texas Supreme Court examined the issue of whether there is a common-law cause of action for loss of filial

35. *Id.* at 196.

36. *Miller*, 118 S.W.3d at 767 (citing Gravis v. Physicians & Surgeons Hosp., 427 S.W.2d 310, 311 (Tex. 1968)).

37. Moss v. Rishworth, 222 S.W. 225, 226 (Tex. Comm'n App. 1920, judgm't adopted).

38. *Miller*, 118 S.W.3d at 768.

39. Roberts v. Williamson, 111 S.W.3d 113 (Tex. 2003).

consortium.[40] A jury found that the plaintiffs' negligence was the proximate cause of the condition of the plaintiffs' child, which included "mental retardation, anti-social-behavior, and . . . partial paralysis of one side of the body."[41] As part of the jury's award of $3,010,001 in damages, the plaintiffs were awarded $75,000 for past loss of filial consortium and one dollar for future loss.

According to Justice Phillips' opinion in *Roberts*, parents are not entitled to a claim for loss of consortium for children that have been seriously injured. This conclusion was reached despite the fact that in *Sanchez v. Schindler*,[42] the supreme court had ruled that parents are entitled to recovery for loss of consortium in wrongful death cases. Even further complicating the issue is the Texas Supreme Court's decision in *Reagan v. Vaughn*[43] in which it held that a child was entitled to recover for loss of consortium when a parent suffers serious injury.

The court of appeals noted that the supreme court in *Reagan* had identified a special relationship between parent and child that deserved "special protection" and therefore concluded that such a protection should flow in reverse as well. Justice Phillips in *Roberts*, however, made a distinction between the two relationships, finding that:

> Although parents customarily *enjoy* the consortium of their children, in the ordinary course of events a parent does not *depend* on a child's companionship, love, support, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent.[44]

Recognizing that this distinction conflicts with the supreme court's ruling in *Sanchez*, Justice Phillips argued that, as a policy matter, when a child dies the tortfeasor should not be excused from liability simply because the victim is not alive to collect damages. Since a child who survives can hold the tortfeasor accountable, the supreme court did not find it necessary to allow a parent compensation in that instance.[45]

The supreme court viewed its decision as a determination of whether or not to recognize a new cause of action and a new duty. It therefore stated that it was necessary to perform a kind of "cost-benefit analysis"[46] to reach its conclusion. According to Justice Phillips, "the fundamental purposes of our tort system are to deter wrongful conduct, shift losses to responsible parties, and fairly compensate deserving victims."[47] He recognized that the "shifting loss" purpose would be clearly met by recognizing

40. Filial consortium is defined as "[a] child's society, affection, and companionship given to a parent." BLACK'S LAW DICTIONARY 304 (7th ed. 1999).
41. *Roberts*, 111 S.W.3d at 115.
42. Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983).
43. Reagan v. Vaughn, 804 S.W.2d 463, 468 (Tex. 1990).
44. *Roberts*, 111 S.W.3d at 117.
45. *Id.* at 119-20.
46. *Id.* at 118 (citing Bird v. W.C.W., 868 S.W.2d 767, 769 (Tex. 1994)).
47. *Id.*

a cause of action, but did not recognize the applicability of the other two purposes. While it is debatable whether deterrence will be accomplished by recognizing many causes of action, a jury could certainly determine that parents whose children are severely injured are deserving victims who might be entitled to compensation in certain circumstances.

In summing up its opinion, the supreme court stated "that no compelling social policy impels us to recognize a parent's right to damages for the loss of filial consortium."[48] This conclusion was made by disapproving several lower court rulings.[49] While certainly the dynamics of a parent-child relationship are not the same as a spouse-spouse relationship and parents are not generally dependant upon their child in the same way as a child depends on its parent, there seem to be other elements of consortium that are being ignored. Certainly, the supreme court recognized in *Sanchez* that compensating parents in wrongful death cases would be justified by the goals of the tort system. This begs the question as to why it would not apply in circumstances such as these where the jury found that the defendant's negligence was the proximate cause of the severe and persistent incapacity of the parent's child.

Justice Jefferson, joined by Justice Schneider and Justice O'Neill, dissented, noting that the supreme court's decision "creates, but does not adequately justify, a prominent paradox in Texas law."[50] In his analysis, Justice Jefferson noted the four major extensions in common law permitting claims of consortium: a wife's separate consortium claim; a parent's consortium claim for a child's death; a child's consortium claim for a parent's death; and a child's consortium claim for a parent's serious, permanent injury. In his opinion the supreme court was creating an "anomaly in Texas law"[51] and that failed to do a "meaningful examination of Texas' consortium precedent, the importance that Texas has historically placed on the parent-child relationship, or this [c]ourt's decisions analogizing that relationship to the reciprocal nature of the husband-wife relationship."[52]

As Justice Jefferson points out, the underlying fear that Justice Phillips expresses in his decision is that a common-law right of filial consortium will not be applied with consistency by the courts. His response, quoting an Arizona court, is an eloquent explanation of the chronic disease infecting the Texas tort law system:

> This [mantra], of course is the hue and cry in many tort cases and in essence is no more than the fear that some cases will be decided

48. *Id.* at 120.

49. *See* Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 414 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd by agr.) (approving award of filial consortium); Enochs v. Brown, 872 S.W.2d 312, 322 (Tex. App.—Austin 1995, no writ) (recognizing parent's right to filial consortium); *see also* Parkway Hosp. v. Lee, 946 S.W.2d 580 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

50. *Roberts*, 111 S.W.3d at 125.

51. *Id.* at 127.

52. *Id.*

> badly. Undoubtedly, the system will not decide each case correctly in this field, just as it does not in any field, but here, as in other areas of tort law, it [is] better to adopt a rule which will enable courts to strive for justice in all cases rather than to rely upon one which will ensure injustice to many.[53]

While the supreme court has repeatedly recognized the strong and unique relationship between parent and child and has recognized in *Reagan* that compensation is justified when that relationship is harmed due to tortious actions, the *Roberts* court has foreclosed the ability of juries to weigh the facts of a case to determine the justification for compensation when the child is severely injured. In Texas, a parent can recover his or her loss if a child dies, but is left with no compensation if his or her child lies in a vegetative state for thirty years. Under which circumstance would the parent suffer more?

D. Employee Drug Testing: Duty of Care

In *Mission Petroleum Carriers, Inc. v. Solomon*, the Texas Supreme Court examined whether there is a common-law duty owed by an employer conducting urine specimen testing for drugs pursuant to Department of Transportation ("DOT") guidelines.[54] Mission Petroleum Carriers, Inc. ("Mission") required its truck drivers to submit to drug testing under the guidelines of DOT regulations.[55] These guidelines contain specific protocols for the collection process. In collecting a sample from the plaintiff, Roy Solomon ("Solomon"), Mission violated several of these protocols. Solomon's test came back positive for THC. When he was informed by a Medical Review Officer ("MRO"), Solomon asserted that the result was impossible because he had never used marijuana. A second portion of Solomon's sample was sent to a separate laboratory. THC was found once again. Solomon was terminated by Mission as a result of these tests.[56]

Under DOT regulations, a prospective employer of a truck driver must review the drug test results of an applicant from previous employers for the previous two years.[57] Thus, when Solomon attempted to gain employment as a truck driver from another employer, they submitted a request form to Mission and determined that he had failed a prior drug test. On this basis, Solomon could not find employment as a truck-driver elsewhere.[58]

At trial, the jury found Mission guilty of negligence and awarded Solomon damages for medical care, loss of earning capacity, and mental anguish totaling $802,444.22 as well as $100,000 in exemplary damages on

53. *Id.* at 128 (quoting Univ. of Ariz. Health Scis. Ctr. v. Sup. Ct., 667 P.2d 1294, 1298 (1983)).
54. Mission Petroleum Carriers, Inc. v. Solomon, 106 S.W.3d 705 (Tex. 2003).
55. 49 C.F.R. §§ 40.1-.39, 382.305 (1996).
56. *Mission Petroleum Carriers, Inc.*, 106 S.W.3d at 707.
57. 49 C.F.R. §§ 382.405(f), .413(a)(1)(d) (1996).
58. *Mission Petroleum Carriers, Inc.*, 106 S.W.3d at 707.

a finding that Mission acted with malice. The trial court's ruling was affirmed by the court of appeals, which held that "Mission owed its employees a duty to use reasonable care in the collection of urine samples for drug testing."[59]

In deciding whether or not to impose a duty in these circumstances, the supreme court reviewed the applicable regulations extensively. It noted that there were several options for Solomon to address Mission's failure to follow DOT protocols and that Solomon was provided with guidelines that were dictated by DOT regulations when he was hired. According to Justice Jefferson, the ultimate responsibility of validating the test rested with the MRO, who could invalidate the test based upon improper handling. He noted that Solomon did not avail himself of two procedural protections. First, Solomon signed a Custody and Control Form, without which the MRO "cannot confirm the chain of custody and must contact the employee to discuss the positive result."[60] Second, he did not "disclose to the MRO Mission's alleged malfeasance during the collection process."[61] The supreme court further noted that Solomon could have filed a complaint with the Associate Administrator for the Federal Highway Administration and that Mission could "have been fined $10,000, lost its ability to obtain insurance, or received an unsatisfactory safety rating."[62] What Justice Jefferson failed to realize is that Solomon probably would have been fired had he taken those actions.

The supreme court recognized that Solomon was asserting a valid interest in protecting the possibility of gaining future employment from the negligent handling of urine samples under the DOT regulations. But the supreme court found, however, that it was "not persuaded that case-by-case adjudication of collection procedures through tort litigation would serve the broader interest Solomon quite properly seeks to protect."[63] Rather it was determined that "the DOT's comprehensive statutory and regulatory scheme, coupled with the authority granted to the MRO, affords significant protection to employees who are the subject of random drug tests."[64]

Much of Mission's arguments relied on the premise that Solomon was an at-will employee that Mission could discharge at any time, and therefore, it was under no duty to handle the drug test under any protocol. Solomon's claims, however, were not based upon wrongful termination, but rather that Mission's duty was to not destroy his potential for employment in his chosen field. Justice Jefferson focused his analysis on whether acknowledging such a duty comported with the federal statutory scheme and Texas common law. Despite this fact, the supreme court still ex-

59. Mission Petroleum Carriers, Inc. v. Solomon 37 S.W.3d 482, 488 (Tex. App.—Beaumont, 2001), *rev'd* 106 S.W.3d 705 (2003).
60. *Mission Petroleum Carriers, Inc.*, 106 S.W.3d at 713-14.
61. *Id.* at 714
62. *Id.*
63. *Id.*
64. *Id.* at 715.

amined the at-will aspects of the issue, stating that it needed to approach the claim in its proper context. The supreme court equated the drug test to any other investigation that an employer may conduct concerning an employee prior to termination and that no duty of care would be imposed in those circumstances, regardless of whether or not it had an effect on the employee's chances for future employment. Justices Enoch, Phillips, and O'Neill in a concurring opinion found it unnecessary to discuss the issue of employment at-will. It is unclear whether the supreme court's comments in this area were mere *dicta* or if it is actually stating that it would not be willing to "impose common-law liability on an employer who conveys false information that results in its former employee being unemployable in his chosen career."[65]

Judge Schneider in a concurring opinion differed with the supreme court's reluctance to impose a common-law duty that would interfere with the DOT regulations. He argued that the supreme court is in essence ruling that the regulations preempt common-law duty without doing the "usual preemption analysis."[66] While stating the belief that a common-law duty could coexist with the regulations, Judge Schneider found that Solomon's claims should have been denied based upon causation. He argued that there was no evidence to prove that any of Mission's alleged violations of protocol proximately caused an improper test result. The result for Mr. Solomon is that false statements regarding his past drug use are free to be published by his former employer with impunity.

E. Applicability of Common Carrier Status

The courts in the past have identified a special class of transportation services that is called "common carriers." This class is defined as "those in the *business* of carrying passengers and goods who hold themselves out for hire by the public."[67] This standard is "that degree of care that would be exercised by a very cautious and prudent person under the same or similar circumstances."[68]

In *Speed Boat Leasing, Inc., v. Elmer*, the Texas Supreme Court examined whether or not a service offering rides in the Gulf on a speedboat would qualify as a common carrier.[69] The supreme court asserted that the key to identifying a common carrier is to look to the "primary function"[70] of the service provider. According to the supreme court the question is "whether the business of the entity is public transportation or whether such transportation is 'only incidental' to its primary business."[71]

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65. *Id.* at 717.
66. *Id.*
67. Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 213 (Tex. 1989); *see also* Dallas Ry. & Terminal Co. v. Travis, 125 Tex. 11, 78 S.W.2d 941, 942 (1935).
68. *Dallas Ry. & Terminal Co.*, 78 S.W.2d at 942.
69. Speed Boat Leasing, Inc. v. Elmer, 124 S.W.3d 210 (Tex. 2003).
70. *Id.* at 213.
71. *Id.* (citing, Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 213 (Tex.1989)).

The facts of the case were that Doris Elmer, the plaintiff, was a seventy-year-old woman who was offered a ride on a boat operated by Speed Boat Leasing, Inc. ("Speed Boat") called the "Gulf Screamer" in exchange for allowing Speed Boat to advertise in the office of the condominium she managed. The speedboat operator warned Elmer that the ride would be rougher in the front of the boat, but Elmer chose to sit there anyway. It was the captain's testimony that Elmer was given safety instructions prior to the ride, although Elmer denied this. Due to the jolting that occurred while Elmer rode in the front, her spine was fractured.[72]

At trial Elmer requested that the jury be instructed to apply the higher standard of care owed by a common carrier. The trial court declined to do so and gave the instruction for simple negligence instead. The jury assigned thirty-five percent negligence to Speedboat and sixty-five percent negligence to Elmer, and as a result, the court awarded nothing. On appeal, it was held that the standard for a common carrier should have been applied and the case was reversed and remanded.

The supreme court determined that "although Speed Boat Leasing transports its passengers across the waters of the Gulf of Mexico, its primary purpose is to entertain, not to transport from place to place."[73] The supreme court emphasized the fact that the passengers' points of departure and arrival were the same and that the primary attraction of the rides was "to supply passengers with an exhilarating fun ride."[74] Also emphasized was the extensive references in Speed Boat's advertising that referred to a "THRILLING" and "SCREAMING" ride. The supreme court likened the rides offered by Speed Boat to an amusement park ride, comparing them to the definition of an amusement ride in a Texas statute: "a mechanical device that carries passengers along, around, or over a fixed or restricted course or within a defined area for the purpose of giving the passengers amusement, pleasure, or excitement."[75] The supreme court then went on to note that courts have applied a standard of ordinary care to providers of amusement rides.[76]

F. Premises Defects Liability: Actual Knowledge Requirement

Wal-Mart Stores, Inc., v. Miller was a premises defect case in which the Texas Supreme Court examined whether a trial court's grant of a judgment not withstanding the verdict ("JNOV") was valid on the issue of actual knowledge.[77] The supreme court stated that the duty of a licensor

72. *Id.* at 211.
73. *Id.* at 213.
74. *Id.*
75. Tex. Occ. Code Ann. § 2151.002(1) (Vernon 2004).
76. *Speed Boat Leasing, Inc.*, 124 S.W.3d at 213 (citing *see, e.g.*, Scroggins v. Harlingen, 112 S.W.2d 1035, 1038 (Tex. 1938), judgm't set aside on reh'g by, 131 Tex. 237, 249, 114 S.W.2d 853).
77. Wal-Mart Stores, Inc. v. Miller, 102 S.W.3d 706 (Tex. 2003).

to a licensee regarding a premises defect is the following:

> It is well settled in this State that if the person injured was on the premises as a licensee, the duty that the proprietor or licensor owed him was not to injure him by willful, wanton, or gross negligence. . . . An exception to the general rule is that when the licensor has knowledge of a dangerous condition, and the licensee does not, a duty is owed on the part of the licensor to either warn the licensee or to make the condition reasonably safe.[78]

The trial court had granted a motion for JNOV after the jury had found Wal-Mart seventy percent negligent and Miller thirty percent negligent. On appeal Miller argued that the JNOV was improper because there was some evidence that he lacked knowledge of the dangerous condition.[79]

Brian Miller worked for a plumbing company that was hired by Wal-Mart to install an eyewash machine in the mechanics bay of one of its stores. Miller was escorted to a storeroom inside which was a stairway leading to the water lines and shutoff valve. Miller noticed at this time that Wal-Mart employees were unloading boxes and stacking them on the stairs. On the way up the stairs, "Miller noticed the stairs were 'kind of slippery or slick' and that boxes were stacked along both sides of the stairway's middle section."[80] Upon descent, Miller's coworker warned him "to be careful of the stairs because they were kind of slippery."[81] Miller held onto the handrail on the way down, but when he reached the boxes it became necessary to let go so that he could pass through them. Miller caught his foot on one of the boxes and he slipped on a step and fell.[82]

Miller's argument on appeal of the JNOV was that while he was aware that the boxes were present on the stairs, he had not realized the danger that they presented. This seems logical since it was the boxes blocking his descent, combined with his inability to grasp the handrail, combined with the slippery stairs that created the dangerous condition that led to his fall. Certainly, he could not have recognized this hazardous collection of circumstances until he had already entered the area.[83] This parallels the appeals court's ruling that it was reasonable to infer that Miller did not fully comprehend the danger created by the various dangerous conditions that existed.[84]

The supreme court held that Miller had actual knowledge of all of the *factors* that created the condition that Miller complained of, and therefore, there was no evidence "to support the jury's finding that Miller did

78. *Id.* at 709 (citing State v. Tennison, 509 S.W.2d 560, 562 (Tex.1974)).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 708.
83. This would seem to be analogous to knowing the condition of a newborn only after birth. *See* Miller v. HCA, Inc., 118 S.W.3d 758, 762 (Tex. 2003).
84. *Wal-Mart*, 102 S.W.3d at 708 (citing Miller v. Wal-Mart Stores, Inc, 54 S.W.3d 481 (Tex. App.—Corpus Christi 2001)).

not know about the dangerous condition."[85] Miller's argument, however, was that he did not fully *appreciate* the danger posed by this condition until he was already in the precarious position of trying to descend on wet steps, while being unable to grasp the handrail. The supreme court appeared to hold that as long as Miller knew about the factors that made the condition dangerous, it was not necessary for him to fully appreciate the danger created by these factors in combination in order to be ascribed actual knowledge. This is a classic example of the Texas Supreme Court violating the constitutional prohibition against it finding and/or reviewing factual sufficiency.

G. Worker's Compensation Act: Employer-Employee Status

Under the exclusive remedies provision of the Worker's Compensation Act,[86] "recovery of worker's compensation benefits is the exclusive remedy of an employee covered by worker's compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee."[87] In *Wingfoot Enterprises, v. Alvarado*,[88] the question before the supreme court was whether the provision should apply to two employers when one employer is a general employer and the second employer is "one who has become an employer by controlling the details of a worker's work at the time of injury."[89]

Marleny Alvarado was an employee of Wingfoot d/b/a Tandem Staffing ("Tandem") that was in the business of employing workers and providing temporary labor to companies. In this case the defendant was assigned to work for Web Assembly, Inc. ("Web"). Tandem maintained most of the responsibilities of an employer regarding its employees. It was responsible for "hiring, screening, and terminating employees sent to Web."[90] In addition, Tandem was "responsible for paying the employee's salaries, unemployment taxes, social security taxes, and for withholding federal income taxes."[91] Furthermore, Tandem had supervisors who remained on site and oversaw the workers that it provided. While Web was the supervisor of specific tasks performed by Tandem's employees, it was Tandem that determined which tasks were performed by which employee.[92]

When Alvarado was injured on the job at Web, she sued both Tandem and Web for negligence. Prior to trial, Tandem moved for and was awarded summary judgment based on the exclusive remedy clause of the Worker's Compensation Act. Alvarado appealed the trial court's ruling and the court of appeals reversed. The appeals court ruling was based on

85. *Id.* at 710.
86. Tex. Lab. Code Ann. §§ 401.001 *et seq.* (Vernon 1996 & Supp. 2004).
87. *Id.* § 408.001(a).
88. Wingfoot Enters. v. Alvarado, 111 S.W.3d 134 (Tex. 2003).
89. *Id.* at 139.
90. *Id.* at 135.
91. *Id.*
92. *Id.*

Archem Co. v. Austin Indus., Inc. which held that when "one entity 'borrows' another's employee, workers' compensation law identifies one party as the 'employer' and treats all others as third parties."[93] According to the appeals court, a "right to control" test should be applied, and a jury could find that either Tandem or Web was Alvarado's employer.[94] The supreme court recognized that there were conflicting opinions in the lower courts on the issue and granted petition to resolve the confusion.

Alvarado's argument was that she was an employee of Tandem up until the point that Web "took control of details of her work."[95] At that point, Alvarado argued, she became a "borrowed employee" of Web and that under the statute one party should be identified as her employer and the rest should be considered third parties. The supreme court took the approach of examining the statute to determine whether both Tandem and Web could both be considered employers of Alvarado and therefore limited to liability under the worker's compensation act. According to Justice Owen, Alvarado fell within the definition of "employee" under the Act for both Tandem and Web. Additionally, Justice Owen found that Alvarado's activities at the time of her injury fell under the Act's definition for "course and scope of employment"[96] for both Tandem and Web.

In analyzing the issue, Justice Owen looked to the language of the statute as well as legislation in related areas. She noted that the definitions of employer and employee in the act do not "expressly foreclose the possibility that there may be more than one employer."[97] Further validation for the concept of dual employers was found in other provisions of the Texas Labor Code. First, she observed that the Code recognized "temporary common worker employer[s]" and "user[s] of common workers."[98] The only apparent relevance being that the legislature knows this sort of thing is going on. How this bears on the determination of whether both parties would be simultaneously considered employers for purposes of the Worker's Compensation Act is difficult to comprehend.

Perhaps more on point, the supreme court noted that the Code "recognizes that a general contractor may procure workers' compensation coverage for subcontractors and subcontractors' employees."[99] It also noted that under this circumstance the general contractor could be the employer of the "subcontractor's employee only for purposes of the worker's compensation laws of this state."[100] According to the supreme court, it could take two things from the Labor Code. First, it expressly

93. Archem Co. v. Austin Indus., Inc., 804 S.W.2d 268, 269 (Tex. App.—Houston [1st Dist.] 1991, no writ).

94. Alvarado v. Wingfoot Enterprises, 53 S.W.3d 720 (Tex. App.—Houston [1st Dist.] 2001), judgm't rev'd, 111 S.W.3d 134 (Tex. 2003) (citing Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc., 35 S.W.3d 591 (Tex. 2000); *Archem*, 804 S.W.2d at 270).

95. *Wingfoot Enterprises*, 111 S.W.3d at 138.

96. TEX. LAB. CODE ANN. § 401.012(b)(1) (Vernon Supp. 2004).

97. *Wingfoot Enterprises*, 111 S.W.3d at 139-45.

98. *Id.* at 140 (citing TEX. LAB. CODE ANN. § 92.002(7) (Vernon Supp. 2004)).

99. *Id.* at 141 (citing TEX. LAB. CODE ANN. § 406.123(a) (Vernon 2003)).

100. *Id.* (citing TEX. LAB. CODE ANN. § 406.123(e) (Vernon 2003)).

recognizes the existence of temporary employment agencies and, second, it does not "abhor the concept of two employers for workers' compensation purposes."[101]

Justice Owen then made reference to the Staff Leasing Services Act ("SLSA").[102] While it noted that this Act applied to situations "in which the employee's assignment is intended to be of a long-term or continuing nature,"[103] and Tandem assigned Alvarado to Web as a temporary employee, the supreme court looked to the SLSA for guidance. According to the supreme court, under the SLSA, the leasing company, which would correspond to Tandem in this case, has a choice to elect coverage by workers' compensation for both itself and its client. If it chooses not to elect coverage, then both the leasing company and its client would be subject to common-law negligence. From this Act the supreme court inferred a general policy to "encourage employers to obtain workers' compensation insurance coverage by providing benefits to the employer"[104] and by "provid[ing] disincentives"[105] if the employer doesn't elect coverage.

The supreme court then went on to examine the merits of the "right-to-control" doctrine asserted by Alvarado. The tenets of the doctrine were enunciated in two cases cited by and disapproved by the supreme court, *Smith v. Otis Engineering Corp.*[106] and *Archem Co. v. Austin Industrial, Inc.*[107] According to both decisions the law "require[s] that one party be named the employer and all others be classified as third parties outside the purview of the workers' compensation law."[108] The supreme court took issue with these decisions, arguing that the employee and the employers in these circumstances would each fall within the definitions of the Worker's Compensation Act, and therefore the Act should apply.

The supreme court preferred the approach of *Texas Industrial Contractors, Inc. v. Ammean*,[109] stating "that [when] a worker is hired by one company that has contracted to do work for another, that company has a workers' compensation policy, and the worker receives benefits under that policy following an award by the Texas Workers' Compensation Commission, the worker's common-law claim against that company is barred by the [Labor Code's] exclusive remedy provision, even if control over the details of the work is in the hands of the other company with

101. *Id.* at 142.

102. TEX. LAB. CODE ANN. § 91.001 (Vernon 2004).

103. *Wingfoot Enterprises*, 111 S.W.3d at 140 (quoting TEX. LAB. CODE ANN. § 91.001(14) (Vernon 2003)).

104. *Id.* at 142.

105. *Id.*

106. Smith v. Otis Engineering Corp., 670 S.W.2d 750 (Tex. App—Houston [1st Dist.] 1984, no writ).

107. Archem Co. v. Austin Indus., Inc., 804 S.W.2d 268, 268 (Tex. App.—Houston [1st Dist.] 1991, no writ).

108. *Smith*, 670 S.W.2d at 751.

109. Texas Indus. Contractors, Inc. v. Ammean, 18 S.W.3d 828 (Tex. App.—Beaumont 2000, no pet.).

which that company has contracted."[110] Thus, the supreme court determined that applying this approach to Alvarado's case would give "effect to the policy behind the workers' compensation statute which deprives the injured employee of a subscriber of many common-law rights in return for prompt compensation benefits and medical treatment."[111] The obvious theme in this decision is to cram as many circumstances as possible into statutory liability, in order to avoid common-law torts.

H. Intentional Infliction of Emotional Distress: Extreme and Outrageous Conduct

In *Tiller v. McLure*,[112] the Texas Supreme Court addressed intentional infliction of emotional distress. The elements that must be proven are "(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe."[113] The trial court had rendered a judgment not withstanding the verdict against the plaintiff and the appeals court had reversed that decision concluding that "there was some evidence of extreme and outrageous conduct, because, despite his knowledge that Barbara McLure was susceptible to emotional distress, Tiller 'engage[d] in a course of conduct that a jury could have reasonably believed to be harassing, intimidating, bullying, and extreme.'"[114]

The issue before the supreme court was whether there was no evidence to support a finding that the conduct of the defendant, Billie Tiller, was "extreme and outrageous." The facts of the case were that Tiller had contracted with a company owned and run by Barbara McLure's husband to have construction done on his property. After the project began, McLure's husband was diagnosed with a brain tumor and was no longer able to work on the project. McLure sent a letter to Tiller explaining the circumstances and notifying him that their son Jack McLure would be taking charge and to contact him "with any questions, comments, or concerns regarding the project."[115] Tiller's reaction to the circumstances could hardly be described as understanding. Upon receiving the letter, he called Barbara and "raised hell with her."[116] He threatened to terminate the contract when the construction site was closed on the day of her husband's funeral. Between December and March, he called Barbara "approximately sixty times," including "non-business hours," "late in the evening, over the Christmas holidays, and once on a Sunday morning."[117]

110. *Wingfoot Enterprises*, 111 S.W.3d at 146.
111. *Id.* at 149.
112. Tiller v. McLure, 121 S.W.3d 709 (Tex. 2003).
113. *Id.* at 713 (citing Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62, 65 (Tex. 1998)).
114. *Id.* (quoting McLure v. Tiller 63 S.W.3d 72 (Tex. App.—El Paso, 2001)), judgm't rev'd, 121 S.W.3d 709 (Tex. 2003).
115. *Id.* at 711-12.
116. *Id.* at 712.
117. *Id.*

The supreme court described Tiller's tone on these phone calls to be "consistently rude, demanding, and curt."[118] Tiller was late making payments throughout the project, and he refused to make the final payment of $36,958. At trial, the jury awarded McLure $500,000 in actual damages and $1.5 million in punitive.[119]

In determining that the evidence did not support a finding of "extreme and outrageous" conduct, the supreme court noted that Tiller's calls "were never excessive on one day, nor did Tiller consistently call Barbara McLure at inappropriate times."[120] The supreme court also noted that McLure was never physically threatened and no "vulgar or obscene language"[121] was used. The supreme court also noted that the behavior occurred in a business context and that "Tiller's calls, while numerous and unpleasant, related to the contracts" and "never directly attacked Barbara McLure."[122] Therefore, the question was whether Tiller's "entire course of conduct, viewed as a whole, was extreme and outrageous."[123] While the supreme court recognized that it had found a course of conduct was "extreme and outrageous as a matter of law" in prior rulings, it noted that it was not only "regularity" that was a factor, but also severity. According to the supreme court, "Tiller's course of conduct in this commercial contract dispute was not severe enough to constitute extreme and outrageous conduct."[124]

I. GOVERNMENTAL IMMUNITY

1. Tort Claims Act: Definition of "Use"

In *Dallas Area Rapid Transit v. Whitley*,[125] the Texas Supreme Court examined whether the Tort Claims Act[126] waived sovereign immunity in a unique fact situation where a passenger on a bus was injured by another passenger after he had been left stranded by the bus driver. Under the Act "a governmental unit's sovereign immunity is waived for 'property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if: (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment.'"[127]

While the injuries to the plaintiff, Harold Whitley, were inflicted by another passenger that was out of the control of the transit authority's

118. *Id.*
119. *Id.* at 713.
120. *Id.* at 714.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 715.
125. Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540 (Tex. 2003).
126. TEX. CIV. PRAC. & REM. CODE ANN. § 101 (Vernon 2003).
127. *Dallas Area Rapid. Transit*, 104 S.W.3d at 542 (citing TEX. CIV. PRAC. & REM. CODE § 101.021 (Vernon 1997)).

agent, a closer examination of the facts reveals that the actions of its agent created the circumstances that put Mr. Whitley in danger. Whitley has cerebral palsy and is dependant on Dallas Area Rapid Transit (DART) for transportation. While riding on one of DART's buses, another passenger, Mary Burkley, sat behind him and began "verbally harassing [him], eventually threatening him with a box cutter."[128] After Whitley and Burkley got in a tussle, the two were separated. Burkley had to be restrained from assaulting Whitley once again, and eventually the bus driver decided to stop the bus and order, Whitley to exit, saying "he would come back for him in a few minutes."[129] Burkely then exited the bus a couple of blocks later, went home and got reinforcements. The group located Whitley where the bus had dropped him off and proceeded to beat him so badly that he ended up in the hospital for ten days.

The case came to the supreme court after the trial court had granted DART's plea to the jurisdiction based upon sovereign immunity. The court of appeals had reversed, holding that the injuries that Whitley suffered resulted from DART's use of the bus because "the driver chose to force Whitley off the bus and then dropped his attacker off near where Whitley was waiting, and decided to go on without returning to pick up Whitley as promised."[130] On appeal the supreme court held that sovereign immunity was not waived in this case because Whitley's "injuries arose from the bus driver's failure to supervise the public, which is insufficient to waive immunity under the Tort Claims Act."[131] According to the supreme court the test is whether there is a "nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's injuries."[132] It went on to state that "[t]he nexus requires more than mere involvement of property"[133] and that "the [vehicle]'s use must have actually caused the injury."[134]

Thus, the supreme court focused on the issue of causation and noted that "use of a motor vehicle does not cause injury if it does no more than furnish the condition that makes the injury possible."[135] Absent from the supreme court's analysis of the facts is that the bus driver made a decision to stop the bus and make Whitley exit into hazardous conditions. Furthermore, the driver did not return to pick up Whitley as he had prom-

128. *Id.* at 541.

129. *Id.* at 542.

130. Whitley v. Dallas Area Rapid Transit, 66 S.W.3d 472, 476 (Tex. App.—Dallas, 2001), *rev'd*, 104 S.W.3d 540 (Tex. 2003).

131. *Dallas Area Rapid. Transit*, 104 S.W.3d at 542-43.

132. *Id.* at 543 (citing Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 869 (Tex. 2001); LeLeaux v. Hamshire-Fannet Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992) ("The phrase 'arises from' requires a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle or piece of equipment."); Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617, 619 (Tex. 1987)).

133. *Id.* at 543 (citing Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex.1998)).

134. *Tex. Natural Res. Conservation Comm'n*, 46 S.W.3d at 869 (citing *Dallas County Mental Health & Mental Retardation*, 968 S.W.2d at 342-43 (Tex. 1998)).

135. *Dallas Area Rapid Transit*, 104 S.W.3d at 543.

ised, leaving him in an extremely dangerous and helpless position. The driver's improper actions did not relate to "failure to supervise the public," but rather the decision to stop the bus, abandon Whitley in dire circumstances and not use the bus to return for him. All this after being compensated to transport him to his destination. While certainly it can be argued that Whitley's injuries were a result of the driver's *failure* to use the bus in an appropriate manner, it would appear that a "nexus" between Whitley's injury and this improper use does exist. Certainly the legislature recognized in the Tort Claims Act that when the government undertakes to operate motor vehicles, it should accept liability when those vehicles are operated negligently. It would then seem logical that a jury should be entitled to determine whether or not a plaintiff's injuries are the result of negligent operation of a vehicle regardless of whether the act is viewed as affirmative or not.

The issue of the term "use" in the TTCA again arose in an appellate court's ruling in *Brown v. Houston Independent School District*.[136] Again at issue was whether or not governmental immunity was waived because an injury "arises from the operation or use of a motor-driven vehicle."[137] The Texas Supreme Court made a point in this ruling to emphasize that it had previously requested the legislature to clarify the meaning of "use" in this context to no avail. Therefore, it determined that it should apply the ordinary meaning of the word provided by *Mount Pleasant Independent School District v. Estate of Lindburg*, "to put or bring into action or service; to employ for or apply to a given purpose."[138] It then looked to its decision in *Whitley* for the premise that "the use must have actually caused the injury."[139]

The facts of the case were that an on-duty Houston Independent School District ("HISD") police officer, Leo Nicholas pulled over the plaintiff, Brandi Hyde Brown. Nicholas then proceeded to make "sexually suggestive comments and forced [Brown] to lift her shirt."[140] He then ordered her to follow him in her truck to a school parking lot where he sexually assaulted her in her truck. Brown sued HISD "alleging negligence and gross negligence arising from Nicholas' use of the patrol car and HISD's failure to supervise and monitor that use."[141] HISD was granted an affirmative defense of governmental immunity and the ruling was upheld on appeal.

The court referred to its holding in *Holder v. Mellon Mortgage Co.*,[142] in which the court had stated that since the car was not the "direct de-

136. Brown v. Houston Indep. Sch. Dist., 123 S.W.3d 618 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

137. TEX CIV. PRAC. & REM. CODE ANN. §101.021; *see also* §101.051.

138. Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989).

139. *Dallas Area Rapid Transit*, 104 S.W.3d at 543; *see also White*, 46 S.W.3d at 869.

140. *Brown*, 123 S.W.3d at 619.

141. *Id.*

142. Holder v. Mellon Mortgage Co., 954 S.W.2d 786 (Tex. App.—Houston [14th Dist.] 1997), *rev'd on other grounds*, 5 S.W.3d (Tex. 1999).

vice"[143] causing the plaintiff's injury, the "required causal nexus for liability under the TTCA is missing."[144] Again relying on a requirement of causation the court reiterated its holding in *Whitley* that "the [vehicle]'s use must have actually caused the injury."[145] The court further made the tenuous analogy of the situation to prior rulings related to the term "use" in insurance cases.

The police car furnished by HISD certainly cloaked Nicholas with governmental authority. Nicholas certainly used the authority associated with that vehicle to gain control over Brown and to assert control over her. He then used that vehicle to lead her to a location where she was vulnerable and he could commit his crime in the car itself. However, under the court's restrictive definition of "use," Brown's opportunity for justice is cut-off.

2. *Patient's Bill of Rights: Waiver of Governmental Immunity?*

In 2003, the Texas Supreme Court issued rulings in multiple cases, all of which relied upon its holding in *Wichita Falls State Hospital v. Taylor.*[146] The question in those cases was whether the legislature had specifically waived immunity in cases involving the Patient's Bill of Rights by enacting Texas Health and Safety Code Section 321.003, which entitles a person to sue for damages caused by a violation of the Patient's Bill of Rights.[147] The hospital was denied immunity at the appellate level where the court had ruled that "Section 321.003 constitutes a clear and unambiguous legislative waiver of immunity from suit."[148]

At issue was the language in Section 321.003 that states:

> (a) A treatment facility or mental health facility that violates a provision of, or a rule adopted under, this chapter . . . *is liable* to a person receiving care or treatment in or from the facility who is harmed as a result of the violation.
> (b) A person who has been harmed by a violation *may sue* for injunctive relief, damages, or both.[149]

The supreme court noted that there was no explicit language waiving immunity in this section. Taylor argued, however, that the definitional section of chapter 321 refers to Section 521.003 for the definition of "mental health facility." Under that section "mental health facility" is defined as:

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143. *Brown*, 123 S.W.3d at 620.

144. *Id.*

145. *Dallas Area Rapid Transit*, 104 S.W.3d at 540 (citing *White*, 46 S.W.3d at 869).

146. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692 (Tex. 2003); *see also* Austin State Hosp. v. Fiske, 106 S.W.3d 703 (Tex. 2003); Cent. Counties Ctr. for Mental Health & Mental Retardation Servs. v. Rodriguez, 106 S.W.3d 702 (Tex. 2003); Beaumont State Ctr. v. Kozlowski, 108 S.W.3d 899 (Tex. 2003).

147. TEX. HEALTH & SAFETY CODE ANN. § 321.003 (Vernon 2001).

148. *Wichita Falls State Hosp.*, 48 S.W.3d at 782.

149. § 321.003 (a), (b).

(a) an inpatient or outpatient mental health facility *operated by the department, a federal agency, a political subdivision*, or any person;
(b) a community center or a facility operated by a community center; or
(c) that identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided.[150]

The question for the supreme court then became "whether this incorporated definition is the functional equivalent of an explicit legislative directive waiving the State's immunity."[151]

Prior to doing his analysis of the statute, Justice Jefferson looked at the historical precedent regarding sovereign immunity and the state's subsequent waiver of immunity in specific circumstances. It noted that "for the Legislature to waive the State's sovereign immunity, a statute or resolution must contain a clear and unambiguous expression of the Legislature's waiver of immunity."[152] However, it recognized that in certain circumstances it had "found waiver of sovereign immunity absent 'magic words.'"[153] In those circumstances the supreme court cited four factors that bear on the its determination of the issue:

(1) the statute must waive immunity "beyond doubt;"
(2) the supreme court will "generally resolve ambiguities by retaining immunity;"
(3) if the statute requires that the State be joined in a lawsuit where "immunity would otherwise attach," then immunity is waived; and
(4) whether or not the State has simultaneously enacted "measures to insulate public resources from the reach of judgment creditors."[154]

In reference to the first factor, the supreme court argued that the Act would not be rendered meaningless if immunity were not waived. It noted that there would still be liability under the act against private facilities. It further observed that the act was initially prompted by concern over private facilities. Justice Jefferson further argued that to apply Taylor's reasoning would indicate that the statute waived *federal* immunity, something the Texas Legislature is not authorized to do. Regarding the second factor, Justice Jefferson stated that the strongest indicator for immunity in this circumstance would be the ambiguity created by incorporating Section 571.003 into Section 321.001. Therefore, since the court viewed the language to be ambiguous, the presumption against waiver of immunity controlled. On the third factor, the court noted that there were no provisions in the Patient's Bill of Rights that required the state to be

150. *Id.* § 571.003(12)(a)-(c).
151. *Wichita Falls State Hosp.*, 106 S.W.3d at 799.
152. *Id.* at 696.
153. *Id.* at 697.
154. *Id.* at 697-98.

joined as a party. Finally, the supreme court observed that waiving immunity in this case would "subject the state to indeterminate damage awards"[155] and therefore would be contrary to the fourth factor.

3. *Tort Claims Act: Employee Status*

In *Murk v. Scheele*,[156] the issue was whether or not "[u]nder the Texas Tort Claims Act, a person is not an employee of a governmental unit if the person 'performs tasks the details of which the governmental unit does not have legal rights to control.'"[157] One of the defendants in this case was Dr. Steven Murk who was a neurosurgeon at the University of Texas Health Science Center ("UT"). The trial court had granted summary judgment to UT based upon governmental immunity. Murk then moved for summary judgment on the grounds of the Act which states that "a judgment in an action . . . under [the Act] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim."[158] Based upon this language, the trial court granted summary judgment for Murk as well.

The Scheeles argued that while Murk was paid by UT, his "exercise of independent judgment as a treating physician was outside UT's right of control, thereby excluding him from the statutory definition of 'employee.'"[159] The Texas Supreme Court declined to agree. According to the supreme court, "the Act's definition of 'employee' does not require that a governmental unit control *every* detail of a person's work."[160]

III. CAUSATION

In *Marathon Corp. v. Pitzner*,[161] the Texas Supreme Court did a sufficiency of the evidence review for a judgment rendered in favor of the plaintiff, John Pitzner, which was upheld by the Corpus Christi Court of Appeals. Pitzner was an air conditioning repairman that was repairing units on the roof of a building leased by Marathon Corporation ("Marathon"). All of Marathon's employees left while Pitzner was still working on the air conditioners. Two hours later, "Pitzner was found semi-conscious in the parking lot with severe head injuries."[162] Pitzner had used a ladder to get on top of the roof, but when he was found the ladder was missing. "A screwdriver with a burnt tip was found near Pitzner in the parking lot, but there were no burns on Pitzner or other indications of contact with electricity."[163] Pitzner's injuries were so severe that a guardian had to bring the action, and he had no recollection of what occurred.

155. *Id.* at 701.
156. Murk v. Scheele, 120 S.W.3d 865 (Tex. 2003).
157. *Id.* at 866.
158. *Id.*
159. *Id.* at 867.
160. *Id.*
161. Marathon Corp. v. Pitzner, 106 S.W.3d 724 (Tex. 2003).
162. *Id.* at 726.
163. *Id.*

Pitzner sued Marathon on a premises liability claim because of evidence that "the premises did not comply with Dallas city building and mechanical codes in certain respects." He cited two violations in particular as the cause of his fall:

> First, air conditioning units were required to have a thirty-inch work space in front if their access panels. The access panels of the two units on Marathon's premises faced one another and were ten to twelve inches shy of the code requirements. The spacing from electrical components inside the access panel was also less than the thirty-six inches required by the Dallas Electrical Code.
> Second, the air conditioning units did not have a power disconnect on the roof so that all electrical power to the units could be shut off by someone working on the roof. The power disconnect to the units themselves was located downstairs, inside the building and the main power to the building was located on the ground outside of the building.[164]

There was a great deal of evidence from both sides related to the theory that Pitzner received an electrical shock and as a result was thrust backwards and fell from the roof.

The supreme court's ruling turned on the sufficiency of evidence to support the trial court's ruling that the alleged premises defects were the proximate cause of Pitzner's injuries. According to the court "the components of proximate cause are cause in fact and foreseeability."[165] And "[t]he test for cause in fact, or 'but for causation,' is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'"[166] The crucial factor that the supreme court relied upon in its decision was that "a finding of cause in fact may be based on either direct or circumstantial evidence, but cannot be supported by mere conjecture, guess, or speculation."[167]

After giving a cursory citation to the standard of review for sustaining a no evidence point of error, it is clear that the real concern of the supreme court in this matter was that a finding of causation could only be based on "suspicions" in this case. According to the supreme court, the only evidence that supported the existence of causation was expert testimony that "pile[d] speculation on speculation and inference on inference."[168] It pointed to evidence that suggested other scenarios such as foul play or fatigue caused by the ninety-five degree heat that day. It noted that in order to find causation, it would be necessary to infer that several actions were taken by Pitzner that could not be confirmed by the evidence. Based upon these factors the supreme court ruled that "there [was] no evidence that the condition of Marathon's premises proximately caused

164. *Id.* at 728.
165. *Id.* at 727.
166. *Id.*
167. *Id.*
168. *Id.* at 729.

Pitzner's injuries."[169]

The supreme court appears to concede that circumstantial evidence can support a finding of a fact. Circumstantial evidence by its nature requires a jury to "speculate" and make "inferences" in order to reach a conclusion. However, the supreme court notes that in this case there is only "slight circumstantial evidence."[170] and that therefore "something else must be found in the record to corroborate the probability of the fact's existence or non-existence."[171] Absent from the supreme court's ruling is a standard for evaluating what constitutes more than "slight circumstantial evidence." It would seem that this judgment would be best left to the fact finder to apply the weight of the evidence in each individual case.

IV. DAMAGES

In *Golden Eagle Archery, Inc., v. Jackson*,[172] Ronald Jackson was given a compound hunting bow manufactured by Golden Eagle Archery, Inc. ("GEA") as a present. While attempting to demonstrate the bow to his wife, the bow "went out of control"[173] and a metal rod "struck Jackson in the eye,"[174] causing rapid blood loss that required a visit to the emergency room. In addition to loss of vision, Jackson "suffered broken bones around the orbit of his eye . . . a ruptured sinus, and a broken nose."[175] Mr. Jackson was also unable to work for two months and had "some permanent impairment to his eye and vision, and some disfigurement."[176] At trial, a damage question was put to the jury that contained the following six categories for damages with the corresponding amounts awarded by the jury:

1)	Medical Care	$25,393.10
2)	Physical pain and mental anguish	$ 2,500.00
3)	Physical impairment of loss of vision	$ 2,500.00
4)	Physical impairment other than loss of vision	$ 0
5)	Disfigurement	$ 1,500.00
6)	Loss of earnings in the past	$ 4,600.00[177]

The appellate court remanded the case to the trial court, holding that an award of zero damages for "'physical impairment other than the loss of vision' was against the great weight and preponderance of the evidence."[178]

169. *Id.* at 726.
170. *Id.* at 729.
171. *Id.*
172. Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757 (Tex. 2003).
173. *Id.* at 760.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 762.
178. *Id.* at 761.

On review the Texas Supreme Court examined whether or not the court of appeals was correct in finding that a zero damages award for the forth category was against the great weight and preponderance of the evidence. Justice Owen's opinion noted that the jury was instructed not to include damages for one category in another category and that no definition was given for "physical impairment." In the supreme court's judgment, a review of factual sufficiency in this circumstance has to take into account that the jury might have awarded damages for that evidence in another category that overlapped.

The supreme court went through a lengthy analysis aimed at resolving the three following issues:

1) "what evidence relates to physical impairment,"

2) "the potential for double recovery," and

3) "how a factual sufficiency review should be conducted."[179]

In its analysis the supreme court comprehensively studied the precedent regarding the meaning of "physical impairment." It noted that most appellate courts agree that in order to recover for physical impairment "the injury must be permanent and affect physical activities."[180] The supreme court further pointed out that there was greater controversy about whether "physical impairment" encompasses hedonic damages.[181] The supreme court defined hedonic damages as "loss of enjoyment of life"[182] and ruminated as to whether this category was covered by the term "physical impairment," and more importantly, whether or not it was compensable.

The standard applied by the court of appeals was "to recover damages for physical impairment, a plaintiff must prove 'that the effect of his physical impairment extends beyond any impediment to his earning capacity and beyond any pain and suffering to the extent that it produces a separate and distinct loss that is substantial and for which he should be compensated.'"[183] Upon citing several disparate rulings on the issue the supreme court ruled that the definition of "physical impairment" applied by the appeals court, one it conceded was prevalent, was improper. According to the supreme court, "that definition does not fully eliminate the overlap among physical impairment, pain, suffering, mental anguish, and disfigurement."[184] More important to the supreme court was that the jury was not given this definition. Accordingly, the supreme court found that the jury could have awarded Jackson for loss of enjoyment of life "as part of physical pain and mental anguish, or disfigurement, or divided com-

179. *Id.* at 764-65.

180. *Id.* at 765 (citing numerous cases).

181. *Id.* at 766.

182. *Id.*

183. Jackson v. Golden Eagle Archery, Inc., 29 S.W.3d 925, 928 (Tex. App.—Beaumont, 2000), judgm't rev'd, 116 S.W.3d 757 (Tex. 2003) (citing Blankenship v. Mirick, 984 S.W.2d 771, 777 (Tex. App.—Waco 1999, pet. denied).

184. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 769.

pensation in some manner between the two categories."[185]

The supreme court then attempted to craft a standard of review for appellate courts when a jury has multiple blanks to fill and is instructed not to overlap damages between categories. Under this standard the court of appeals is to consider whether the jury might have awarded damages for a particular category in one of the other categories and must presume that the jury did not award damages twice for overlapping elements. In applying the standard to the facts of the case, it was argued that the court of appeals should have only considered evidence that was relevant to Jackson's physical impairments other than loss of vision. The supreme court asserted that the evidence regarding Jackson's broken bones, ruptured sinus, and headaches could have been applied in the category of physical pain and mental anguish or not been compensated at all. Regarding evidence of loss of enjoyment of life due to Jackson's two month stay in a hospital, the supreme court conceded that this evidence best fit within the category of "physical impairment," however, the supreme court noted that the jury was not given a definition for physical impairment and therefore could have compensated Jackson for loss of enjoyment of life in another category. While apparently conceding that a jury can be instructed to include loss of enjoyment of life in the definition of "physical impairment," Justice Owen goes on to state that "the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and that a claimant should not be compensated more than once for the same elements of loss or injury."[186]

In the end Justice Owen gave a synapses of the methodology the supreme court expects the court of appeals to follow in these circumstances that must be fully quoted so that all can marvel at the absolute dearth of meaningful guidance:

> The court of appeals should conduct a review of each of these categories, considering the evidence unique to each category. If, after considering evidence unique to a category, the court concludes that the jury's failure to award larger damages for that category is against the great weight and preponderance of the evidence, it should then consider all the overlapping evidence, together with the evidence unique to each other category to determine if the total amount awarded in the overlapping categories is factually sufficient. This takes into account all the evidence regarding damages in categories that overlap, but does not credit that evidence more than once in evaluating the amount awarded by the jury.[187]

In applying this nonsensical "standard" to the facts of the case, the supreme court determined evidently that all of the evidence could be accounted for by the damages awarded in five of the six categories and

185. *Id.* at 770.
186. *Id.* at 772.
187. *Id.* at 773.

there was none left over for the sixth category. Justice Owen acted as juror, not as justice.

Justice O'Neill filed a concurring opinion, along with Justice Schneider that began with the editorial comment: "If I were directed to conduct a factual sufficiency review of the evidence in this case under the standard the court articulates today, I wouldn't have a clue."[188] According to Justice O'Neill the case should be determined according to the standard articulated in *Pool v. Ford Motor Co.*,[189] holding that the court of appeals should

> [D]etail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.[190]

According to Justice O'Neill, the appeals court failed to apply this standard. She faulted the court of appeals for "examining the record for evidence *against* the jury's finding"[191] and "failing to recite all of the evidence that *supports* the jury's finding."[192] Additionally, the justice asserted that "in order to recover, Jackson had to demonstrate that his physical impairment other than the loss of vision produced a distinct loss that was substantial and should be compensated."[193] According to Justice O'Neill, in order to remand, the appeals court would have to identify the evidence that applied to the category in question, state why it did not overlap with the other categories, and then apply the *Pool* analysis.[194]

V. CONCLUSION

The increasing trend for Tort law in Texas is to construct statutory guidelines in an ad hoc manner, reacting to short term economic pressures. Typically, this approach has not come as the result of an in-depth analysis of systemic problems, but a reaction to inflammatory rhetoric and divisive politics. What is apparent is that Texans are no longer being trusted to evaluate the merits of each individual case, with all of the relevant subtleties that typically exist. Instead, a generic framework is being superimposed according to the pressures of lobbyists and their client's needs.

188. *Id.* at 776 (O'Neill & Schneider, J. concurring).
189. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).
190. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 776 (citing *Pool*, 715 S.W.2d at 635).
191. *Id.* at 777.
192. *Id.*
193. *Id.*
194. *Id.*